

Legal Update

Labour and Employment

Summary dismissal for data theft still possible after employee's release from work

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Headnote

Where an employer has already irrevocably released an employee from his duty to work up until the time when his employment contract terminates, it may still dismiss him without notice if it subsequently discovers that the employee committed a serious breach of duty (in this case stealing data) while still working (Hessian Higher Labor Court, Judgment of 29 August 2011 – 7 Sa 248/11).

Facts

The plaintiff had been employed by the defendant-bank since October 2008. He last held the post of departmental head with general signing powers. In June 2010 the parties entered into a deed of release, which provided that the plaintiff's employment contract would terminate on 31 December 2010 and that he would be irrevocably released from the duty to work from 1 July 2010. Shortly before leaving the bank, namely on 29 and 30 June 2010, the plaintiff forwarded a total of 94 e-mails to his private

e-mail account. Neither party disputes that data subject to bank secrecy rules was attached to most of the e-mails. The defendant-bank became aware of this on 7 July 2010 and thereupon terminated its employment relationship with the plaintiff on 20 July 2010 for cause without notice. The plaintiff subsequently offered to immediately delete the transferred data in the presence of a bank representative and in addition brought an action for unfair dismissal in respect of the termination without notice.

Decision

The Local Labor Court allowed the action for unfair dismissal, but its decision was subsequently overturned on appeal to the Hessian Higher Labor Court. The Higher Labor Court found first of all that the plaintiff's conduct constituted a serious breach of duty since he had removed sensitive data from the employer's sphere of control and sent it to his private e-mail account. Furthermore, the Higher Labor Court referred to the Federal Labor Court's case law and correctly pointed out that the fact that the

plaintiff had already been irrevocably released from work at the time of his dismissal did not prevent such dismissal. It is true that his release from work precluded any repetition of his breach of duty. However, the court rightfully held that no danger of a repeated breach is necessary in cases in which the breach of duty is so serious as to destroy all of the employer's trust in the honesty and loyalty of the employee. An employer can normally not be expected in such cases to retain an employee and pay him for the remaining term of his employment contract even if he has been released from work. If the relationship of trust has been irreparably destroyed, the employer cannot be expected to make further salary payments (or a lump-sum settlement agreed in a deed of release), particularly where the employee's length of service has been so short. Therefore, whether or not there was a risk that the employee would repeat his breach of duty was not significant.

Comment

The Hessian Higher Labor Court's decision is to be welcomed since it clearly shows that dismissal is still possible even where the employee has already been released from work and thus there is no risk of a repeated breach of duty. In the end, the court simply confirms the prior case law of the Federal Labor Court (Federal Labor Court, Judgment of 5 April 2001, NZA 2001, 954). Nevertheless, labor courts are often mistakenly influenced when weighing the interests of the parties by the assumption that a summary dismissal for breach of duty is only justified where there is risk that the employee will repeat his breach of duty. This approach fails to take into account that a certain „basic trust“ in the honesty and loyalty of an employee is necessary at all times, even when he no longer has a duty to render his services. In particular, an employer cannot be expected to continue to pay an employee (in some cases a considerable amount of money) during a declared or agreed release from work in the knowledge that such employee has previously committed a serious breach of duty against it. Neither here nor in the case where an employee is terminated for misconduct is the issue of whether his breach of duty constitutes a criminal offense relevant.



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